BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CLAIRE C. JOHNSTONE Claimant	)	
VS.	)	
LIFELINE SYSTEMS, INC. Respondent	)	Docket No. 1,009,971
AND	)	
WAUSAU INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the December 8, 2004 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on June 7, 2005.

APPEARANCES

George H. Pearson of Topeka, Kansas, appeared for the claimant. John M. Graham Jr. of Kansas City, Missouri, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a claim for a February 18, 2003 accident and resulting back injury which the parties stipulated arose out of and in the course of claimant's employment with respondent. The Administrative Law Judge (ALJ) awarded claimant benefits for a 58.5 percent work disability (a permanent partial general disability greater than the functional impairment rating) based on a 100 percent wage loss and a 17 percent task loss.

The sole issue raised on review by the respondent is the nature and extent of claimant's disability. Specifically, respondent argues the claimant should be limited to her functional impairment because she failed to attempt to work at an offered accommodated position. Accordingly, respondent argues claimant failed to make a good faith effort to retain appropriate accommodated work and because the job would have paid within 90 percent of her pre-injury average gross weekly wage she should be limited to her functional impairment.

In the alternative, the respondent argues claimant did not make a good faith effort to find employment and a wage should be imputed to her. Respondent further argues claimant's work disability should be based on a 28 percent wage loss and a 10.5 percent task loss which results in a 19.25 percent work disability.

Claimant argues the offered accommodated job was not within her restrictions and it was not a lack of good faith to refuse to attempt it. Claimant further argues she has made a good faith effort to find employment. Therefore, claimant requests the Board to affirm the ALJ's Award.

The only issue before the Board is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact that are detailed, accurate and supported by the record. It is not necessary to repeat those findings herein. The Board adopts the ALJ's findings of fact its own as if specifically set forth herein except as noted.

The Kansas Appellate Courts have interpreted K.S.A. 44-510e(a) to require workers to make a good faith effort to continue their employment post injury. The Court has held a worker who is capable of performing accommodated work should advise the employer of his or her medical restrictions and should afford the employer a reasonable opportunity to adjust the job duties to accommodate those restrictions. Failure to do so is evidence of a lack of good faith.[1] Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily

[1] See, e.g., *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999), and *Lowmaster v. Modine Mfg. Co.*, 25 Kan. App. 2d 215, 962 P.2d 1100, *rev. denied* 265 Kan. 885 (1998).

terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.[2]

Respondent argues that when claimant was released to return to work after conclusion of her medical treatment she was offered accommodated employment for wages equal to 90 percent or more of her pre-injury average gross weekly wage.

As long as an employee is engaging in any work for wages equal to 90 percent or more of the pre-injury average gross weekly wage the permanent partial general disability compensation cannot exceed the percentage of functional impairment.[3]

Claimant was employed as an account manager selling equipment and marketing to clients in Oklahoma and Kansas. Claimant sold emergency response equipment for elderly people. If a button is pushed on the device it sends a call for help. In order to perform her job a large part of her time was spent driving throughout her sales territory. Claimant testified that in her job she averaged 5 hours a day driving and was expected to make between 10 to 15 face-to-face calls on prospective customers each workday.

The claimant's injury in this case occurred when claimant was lifting a file box out of the trunk of her car her back popped and she experienced pain in her left hip which radiated into her left leg. Ultimately, Dr. Paul S. Stein provided treatment which included epidural steroid injections and physical therapy. Claimant was released from medical treatment by Dr. Stein on November 20, 2003. Claimant was provided restrictions that she could drive up to one hour at a time or a total of three hours in an eight-hour workday and a 20-pound limit on occasional lifting.

Claimant made several calls to respondent about returning to work and was finally told she should return to work starting December 29, 2003. Because she had been off work for approximately four months the claimant spent the first day back at work, at the suggestion of her boss, responding to the accumulated e-mails that had been received in her absence from work. Claimant did this work in her office at her home in Wichita, Kansas.

On December 30, 2003, claimant's boss called and asked her to meet him in Olathe, Kansas, the following day. That evening the claimant drove from Wichita to Olathe but made frequent stops so that she did not drive more than an hour at a time. At the meeting the next morning the claimant noted the drive had aggravated her back and that she had not been able to sleep. Claimant was told that accommodations to her job would

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[2] *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, *rev. denied* 265 Kan. 884 (1998).

[3] K.S.A. 44-510e(a).

be made in that she would no longer be selling equipment and would only be doing the marketing. But claimant testified the marketing would require driving the same amount of time as her pre-injury job. And based upon her restrictions the claimant did not think she could perform the job.

Upon her return home the claimant then spent the January 1, 2004 holiday in bed with back pain. The following day, a Friday, claimant again worked on responding to e-mails but late that afternoon she called her boss and told him that although she was scheduled to leave Sunday to go to Florida for a national meeting, she did not think that she could physically make the trip. She was told to either make the trip or find another job. If she could not make the trip she was told to write a letter to human resources indicating her reasons for terminating her job.

Claimant then wrote respondent on January 2, 2004, and indicated that she was physically unable to do the job within the suggested accommodations. She noted she was physically unable to do the driving the job required and she had been told it was either perform that job or quit.

In *Foulk*[4], the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability by refusing an accommodated job that paid a comparable wage. Employers are encouraged to accommodate an injured worker's medical restrictions. In so doing, employers must also act in good faith.[5] In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine[6] or not within the worker's medical restrictions.[7]

The purported job accommodation suggested by respondent was to eliminate the sales function of claimant's job but according to claimant's uncontradicted testimony she would still be required to drive the same amount of time. And such driving far exceeded her restrictions. Under such circumstances it cannot be said that claimant was offered a genuine job accommodation. Nor can it be said claimant did not make a good faith effort to retain her employment. The Board affirms the ALJ's determination that claimant is not limited to her functional impairment but instead is entitled to a work disability analysis.

The permanent partial general bodily disability, or what is also known as "work disability" is defined at K.S.A. 44-510e(a) and provides, in part:

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

[6] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** (Emphasis added.)

Dr. Stein opined claimant suffered a 5 percent whole person impairment pursuant to DRE lumbosacral category II of the AMA *Guides*[8]. Dr. Stein reviewed the list of former work tasks prepared by respondent's vocational expert witness, Karen Terrill, and concluded claimant had lost the ability to perform 4 of 38, or 11 percent of the work tasks the claimant had performed in the 15-year period before her back injury. The doctor noted that any tasks that would require claimant to drive more than three hours in an eight-hour workday would be precluded.

At her attorney's request, the claimant was examined on January 7, 2004, by Dr. Edward J. Prostic. The doctor opined claimant suffered a 14 percent functional whole person impairment as a result of her substantial restriction of motion and nerve symptoms. The doctor noted his rating was a compromise between the range of motion model and the DRE estimate contained in the AMA *Guides*. Dr. Prostic reviewed the list of former work tasks prepared by claimant's vocational expert witness, Dick Santner, and concluded claimant had lost the ability to perform 5 of 22, or 23 percent of the work tasks the claimant had performed in the 15-year period before her back injury.

The ALJ determined that there was no persuasive reason to discount either doctor's task loss opinion and averaged the 23 percent with the 11 percent for a 17 percent task loss. The Board agrees and affirms.

It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).[9] If an injured employee fails to make a good faith effort to find appropriate employment, a wage may be imputed based upon the employee's capacity to earn

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[8] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[9] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

wages.[10] In order to determine if the employee is still capable of earning nearly the same wage, the factfinder must first determine if the employee made a good faith effort to find appropriate employment.[11]

In his analysis of whether the claimant made a good faith effort to find appropriate employment the ALJ concluded:

> Claimant has compiled an extensive list of job contacts and entered them as an exhibit, which she testified is not complete because some of her contacts were lost in process of a move from Wichita to Clarendon, Texas. Although respondent protests claimant has returned to school, Ms. Johnstone testified she is attempting to complete her MBA degree and has returned to school on a part-time basis. She was still actively seeking employment at the time of the regular hearing. The court finds claimant has exercised a good faith effort to find appropriate employment and her wage loss shall be based upon the difference in pre- and post-injury wages. Claimant's wage loss is 100 percent.[12]

The Board agrees and affirms. Averaging claimant's 100 percent wage loss with her 17 percent task loss results in a finding claimant suffers a 58.5 percent work disability.

It should be noted that the ALJ's award paragraph detailing the weeks of benefits contains a calculation error in the section updating the amount of the award that is due and owing. It appears the ALJ calculated that portion by providing temporary total disability and permanent partial disability payments for the same time period. The Board is mindful that K.S.A. 44-510e(a) provides that there is a presumption that the permanent partial disability existed immediately after the injury. However, that presumption is rebutted by a finding that claimant was temporarily totally disabled. Stated another way, permanent partial disability does not exist until the temporary total disability concludes. Accordingly, the award paragraph will be updated to reflect the foregoing comments.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 8, 2004, is modified to correct the calculation error and affirmed in all other respects.

The claimant is entitled to 16.71 weeks of temporary total disability compensation at the rate of $432 per week or $7,218.72 followed by permanent partial disability

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[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[11] *Parsons v. Seaboard Farms, Inc.* 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

[12] ALJ Award (Dec. 8, 2004) at 4.

compensation at the rate of $432 per week not to exceed $100,000 for a 58.5 percent work disability.

As of July 13, 2005, there would be due and owing to the claimant 16.71 weeks of temporary total disability compensation at the rate of $432 per week in the sum of $7,218.72 plus 108.43 weeks of permanent partial disability compensation at the rate of $432 per week in the sum of $46,841.76 for a total due and owing of $54,060.48, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $45,939.52 shall be paid at the rate of $432 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this _____ day of July 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
John M. Graham Jr., Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director